SUPREME COURT, U. S.
FILED
APR 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1604

JERRY S. NIEZEK,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joe B. Goodwin
455 Milam
Beaumont, Texas 77701

Attorney for Petitioner

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IN THE
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No.

JERRY S. NIEZEK,

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versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Jerry S. Niezek, respectfully prays that a writ of certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported in 489 F.2d 730 and appears in Appendix A, infra.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (Appendix B, infra) was entered on February

14, 1974. A timely petition for rehearing (Appendix C, infra) was denied on March 28, 1974, and this petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether congress intended to denounce the conduct of the petitioner as stipulated and therefore whether such conduct was within the terms of the statute as used in 18 U.S.C. §1955 used to describe the five or more persons who conduct, finance, manage, supervise, direct, or own all or part of the gambling business prohibited by the statute.

2. Whether the petitioner was denied due process of law as guaranteed by the fifth and fourteenth amendments of the United States Constitution by being found guilty of conduct which was not denounced by Title 18 U.S.C. §1955.

3. Whether the transfer of petitioner's cause to the summary calendar through application of the Fifth Circuit Local Rule 18 and the subsequent refusal to allow oral argument was a denial of petitioner's right to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America, Fifth Amendment:

"... nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law ..."

Constitution of the United States of America, Fourteenth Amendment:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law ..."

Constitution of the United States of America, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right — to have the assistance of counsel for his defense."

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. 1955:

§1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) "illegal gambling business" means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling changes therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for

arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds of such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Title 18 U.S.C. 371:

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

FIFTH CIRCUIT LOCAL RULES:

Rule 18. Summary Calendar:

(a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary by the clerk, pursuant to directions from the Court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

STATEMENT OF THE CASE

The petitioner, Jerry S. Niezek, along with several others, was indicted and charged with illegal gambling under Title 18, U.S.C. 1955 and 2 and also with violation of Title 18 U.S.C. §371, charging a conspiracy to violate §1955 and 2, U.S.C.A. The petitioner waived his right of trial by jury and entered a plea of not guilty before the Court and a written stipulation of the evidence was submitted to the trial court and no oral testimony was given. At the conclusion of the government's evidence, the defendant duly and timely filed his motion for judgment of acquittal, contending that if the Court found all of the agreed stipulations to be true, that such would not constitute a violation

of either Title 18 U.S.C. 1955 and 2 or a violation of Title 18 §371.

The trial court on July 2, 1973, found the defendant guilty of both counts and imposed sentence on Count 1 as imprisonment for three years and ordered to pay a fine of $5,000 and as to Count 2, three years with the defendant being required to serve six months of the prison sentence imposed as to Count 1 and the remainder of the prison sentence being suspended and the defendant to be placed on probation for a period of three years. Notice of appeal was timely filed to the Court of Appeals for the Fifth Circuit and after briefs had been presented the petitioner was notified that his case had been placed on the summary calendar for disposition without oral argument. Petitioner's conviction was subsequently affirmed on February 14, 1974, and his petition for rehearing was denied on March 28, 1974. The Court of Appeals granted the petitioner a 30 day stay of mandate in order to allow the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. **The Evidence Is Insufficient To Sustain A Conviction As There Was No Proof That The Petitioner Constituted One Of Five Or More Persons Participating In The Conducting, Financing, Managing, Supervising, Directing, Or Owning Of A Gambling Operation, As Required By 18 U.S.C. §1955.**

The following summary of the facts has been drafted viewing the evidence in the light most favorable to

sustain the Court's judgment, as is appropriate on appeal.

Briefly stated, the stipulation reflects that the witnesses, if present, would testify that one George Doty regularly placed bets with the appellant which testimony, if true, would indicate that Niezek was "booking" football wagers for the said Doty. The same is true as to witness, S. D. Knight. In addition, it was stipulated that one Walter Sekaly was a bookie who obtained his line from one Marion Johnson of Orange, Texas, and regularly laid off bets to the said Marion Johnson. The testimony of Raymond Lefkowitz, as stipulated, would show basically the same as that of the said Walter Sekaly; that is, that he, the said Lefkowitz, was a bookmaker who operated on his own but who did regularly lay off bets to the said Marion Johnson. Marion Johnson's evidence was that he was a bookmaker who operated in Orange, Texas, and during the period of time in question received bets from the petitioner and expressed his opinion that because of the characteristics of the manner of betting, that the bets received from the petitioner were lay off bets. Johnson's testimony further reveals that during the 1972 football season he, Johnson, obtained the point spread or "line" from one James Tuppen of Bridge City, Texas. Johnson's testimony further reflected that during the 1972 football season for a period of time in excess of 30 days that one Dr. Richard Jones of Bridge City worked for him and that he paid approximately $900 for his services, which included distributing line information and accepting wagers, and that he, the said Dr. Richard Jones, accepted wagers from

Raymond Lefkowitz, Walter Sekaly, and the Appellant. There is no showing that the said Raymond Lefkowitz, Walter Sekaly, and the Appellant were in any type of business together, and in fact the stipulation affirmatively reflects that they were actually in competition with each other and operated independently of each other. (Appendix 9-10). Other evidence from James Tuppen indicated that he was a professional gambler and during 1971 and 1972 the said Tuppen accepted wagers from bettors on baseball, basketball, and football, and that he, Tuppen, obtained the "line" from various sources throughout the country. Tuppen's testimony further showed that he had three individuals working for him and taking wagers, none of these being the petitioner, and no testimony was given by the said Tuppen showing that he had any dealings whatsoever with the petitioner. It was further stipulated that even though petitioner did place bets with Marion Johnson, that the financial arrangement was the same as for any other bettor; that is, that in putting up a bet with Johnson he was required to put up 10% of the amount bet in order to get the bet placed and the stipulation further recites that the petitioner did not receive any portion of this 10% but rather it was passed on to Johnson, and Johnson did not pay Petitioner any fee for Petitioner's passing these bets on to Johnson.

Your petitioner would suggest that this is a case of first impression as far as can be determined and presents a situation that has never before been before the appellate courts. It was his contention from the beginning that inasmuch as the statute required five

or more persons to conduct, finance, manage, supervise, direct, or own all or part of one given business, that he could not be guilty of violating the statute under the stipulated facts. This was true because there was no one business in which the petitioner was involved with any four other persons. There is no showing that at any time the appellant ever had any connection with any other person than one Marion Johnson and this only in the capacity as a bettor with Johnson, just as any other member of the general public. It was clearly stipulated that the petitioner had no interest in any business with the said Marion Johnson or with any other members of Johnson's so-called organization.

The gambling business, which is prohibited by 18 U.S.C. 1955, must involve "five or more persons to *conduct, finance, manage, supervise, direct, or own* all or part of such business ..." (Emph. Add) From the requirement that five or more persons be involved, it is obvious that the target of the legislation was an organization.

The combination of words used to describe the necessary involvement of the five or more persons clearly suggests and shows that the act is aimed at five or more persons who are actually participating together in the business, whether as top echelon or mere employees, but certainly as part of *one* organization which derives its income from a common source, regardless of who benefits the most out of such organization.

The legislative history of P.L. 91-452, summarizes the purpose of 18 U.S.C. 1955 in its analysis of Section 802 (18 U.S.C. 1511), the related provision, as follows:

> "The intent of Section 1511 and Section 1955 below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business type gambling operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function." H.R. Rep. No. 91 — 91st Cong. 2nd Sess. (1970) 2 U.S. Code Cong. & Admin. News (1970 at p. 4029)

Thus, the statute was intended to embrace within its scope "business-type gambling operations" whose activities are "continuous," "substantial" and "systematically" undertaken, while leaving to local law enforcement those gambling operations which are "sporadic or of insignificant monetary proportions."

It is basic in our jurisprudence that criminal statutes must be strictly interpreted, both with respect to the act charged as the offense and the penalty imposed. See *Pierce v. U. S.* 314 U.S. 396; 62 S.C. 237; *Kordell v. U.S.*, 335 U.S. 345, 69 S.Ct. 106; *Coughlan v. U.S.*, (CA9) 216 F.2d 324.

It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Before a man can be punished, his case must be plainly and unmistakably within the statute.

U.S. v. Bathgate, 246 U.S. 220; 38 S.C. 269; *Donnelley v. U.S.*, 276 U.S. 505; 48 S.Ct. 400; *U.S. v. Resnick*, 299 U.S. 207; 57 S.C. 126.

When liberty is involved, every reasonable doubt must be resolved in the favor of the defendant. *U.S. v. Sheldon*, 2 Wheat (U.S.) 119; *U.S. v. Wiltberger*, 5 Wheat (U.S.) 76.

All of the cases cited by the Government show an operation where five or more persons operated, conducted, financed, managed, supervised, or directed an illegal gambling business and obviously were in business together and not as separate entities. That is, that they were interested in the financing of one individual business and that each of them shared in the profits in some manner or by some means and did not operate a business in competition with each other as the Government's case in this situation as stipulated shows. In the case of the *United States v. Harris*, 460 F.2d 1041, 5th Cir. 1972, the evidence clearly shows

that all of the defendants were operating a gambling house and participated in one way or the other in the operation of the said gambling house. I' was the contention of the appellants in that case that two of the parties involved would not come within the definition provided in §1955, requiring five or more persons because two of the persons involved occupied the status of guard for the business and as a dealer for the business. The Fifth Circuit found that this was adequate to constitute the five persons, inashmuch as the other three parties were clearly a part of the management and supervision of the business. It is interesting to note, however, that all of these persons were together in the operation of one business and not separate businesses. It is further interesting to note that in this case the trial court instructed the Jury that one who has no ownership in the business and who is also without the power to conduct, finance, manage, supervise, or direct such business could not be considered as one of the number of persons necessary to prove a violation. Clearly, it is seen that all of the persons involved in the Harris operation were all conducting one gambling business and not separate gambling businesses.

The case of *U.S. v. Riehl*, 460 F.2d 454, holds "the term 'conduct' refers to both high level bosses and street level employees. It does not include the player in an illegal game of chance nor the person who participates in an illegal gambling activity by placing a bet . . . Before the gambling enterprise may be deemed of sufficient magnitude to warrant Federal proscription it must be carried on by at least five people, in-

cluding its street level employees, its managers, its owners."

U.S. v. Becker, 461 F.2d 230, is to the same effect.

The Government has relied heavily on *U.S. v. Ceraso*, 467 F.2d 653, which stresses that "lay-off bets" are an integral part of a gambling operation. Indeed, this is true, but it is the petitioner's position that the Government's reliance upon *Ceraso* is misplaced. The following language in *Ceraso* is found on page 656:

> ". . . appellants argue that at best the Government proved that only two people, Thomas and Beverly Ceraso, conducted the bookmaking.
>
> (1. The evidence indicated that a jury could reasonably have found otherwise. Troutman and Joseph Casale both gave information on the 'betting line' and took bets. Those acts are clearly within the concepts of conducting a bookmaking operation. Although 'conduct' is nowhere defined in the statute, the authors of simultaneously-enacted U.S.C. §1500, which was to parallel Section 1955, intended 'conduct' to mean any participation in the operation of a gambling business. H.R. Rep. No. 91-1549, 91st Cong. 2nd Sess. (1970) 1970 U.S. Code, Cong. & Admin. News, pp. 4029-30. See United States v. Becker, 461 F.2d 230, at 232 (2nd Cir. filed May 30, 1972) United States v. Riehl, 460 F.2d 454 (Cir. filed May 9, 1972).

> Becker's payment of the telephone bills could have reasonably been found to have made him one of the financial backers of the operation, or at least a participant, and Bosch's conduct in receiving information and giving instructions to Thomas Ceraso gave the jury evidence of his supervising or managing the operation."

While the facts as given in the opinion are not entirely clear, it seems obvious from a full reading of the case and particularly the portions just cited that all of the parties involved were in *one* specific operation and acted together in that operation. For instance, the payment of the telephone bill by one of the parties clearly was a part of the same operation, and the giving and receiving information and giving instructions to another of the parties involved in the operation showed that the party getting such information was operating in conjunction with and a part of the management of the same general operation. This is not true in this case, as there is no showing and indeed it is even conceded by the Government that there was no financial arrangement between any of the parties involved who are alleged to have conducted the illegal gambling business.

As stated before, your petitioner would respectfully urge that the plain reading of the requirement of five or more people shows that they must be engaged in a business together, either as parners or as managers, owners, and employees, and not engaged in separate businesses. If there is any ambiguity in the statute, then your defendant would respectfully urge that the

words of *U.S. v. Bass*, 92 S.C. 515, 523, is the answer. "Where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."

2. The Petitioner Was Denied Due Process Of Law Under The Fifth And Fourteenth Amendments Of The Constitution Of The United States By Being Convicted Of A Violation Of Title 18 §1955 When There Was No Evidence To Support Same.

It is petitioner's contention that if there was no evidence to show that petitioner was engaged with five or more persons in a gambling operation that it is a violation of due process to convict and punish a man without evidence of his guilt. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624; *Johnson v. Florida*, 391 U.S. 596, 88 S. Ct. 1713; *Gregory v. Chicago*, 394 U.S. 111, 89 S. Ct. 946. Petitioner contends that clearly it was not the intent of congress to bring the conduct of petitioner within Title 18 §1955. It is his further contention that the confusion arising from a case of this nature should be settled once and for all times so that the lower courts may know exactly what conduct is condemned by the statute in question. The only way that this can be accomplished is by the granting writ of certiorari so that the full Supreme Court may have an opportunity of clarifying the law in this regard.

3. Through Passage And Implementation Of Local Rule 18, The Fifth Circuit Court Of Appeals Has Abused Its Authority To Control Its Appellate Docket. By Denying All Oral Argument In Cases Placed On The Summary Calendar, The Court Has Unconstitutionally Deprived The Petitioner Of His Right To The Effective Assistance Of Counsel Guaranteed By The Sixth Amendment To The Constitution Of The United States.

Even though this was a case of first impression in the Fifth Circuit and only the second involving 18 U.S.C. §1955 to reach the appellate level anywhere, the petitioner was notified after the briefs were filed that the case had been transferred to the summary calendar (App. D, infra) pursuant to Local Rule 18 and was thus to be decided on the briefs without benefit of oral argument. The appellate rules of procedure do not provide the accused with any hearing regarding this transfer or for any appeal from the Court's decision to place the case on the summary calendar. The subsequent determination of the case without oral argument deprived the petitioner of his constitutionally guaranteed right to the effective assistance of counsel.

There is no question that appellate review has become an integral part of our criminal justice system. The importance of this can be seen in the increasing number of cases which are appealed and in the resulting burden being placed on the appellate courts. The courts are given power to prescribe rules for administration under 28 U.S.C. 2071, and Rule 47, Feder-

al Rules of Appellate Procedure, but those rules cannot be allowed to infringe upon the constitutionally guaranteed rights of the parties. By denying oral argument, Rule 18 deprives the accused of his right to the effective assistance of counsel at one of the most critical times in the entire judicial process.

The importance of oral argument at the appellate level is best understood by referring to the opinions and attitudes of judges who must decide the cases brought before them on appeal. In this regard, see generally R. STERN and E. GRESSMAN, SUPREME COURT PRACTICE 94th ed. (1969) Sec. 14.1 and 483. Rule 45 of the Supreme Court Rules indicates that this Court has recognized the importance of oral argument to the appellate process: "1. The court looks with disfavor on the submission of cases on briefs without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

It is understandable that the court of appeals, overburdened by its busy docket, would feel the need to seek methods which make the judicial process more efficient; however, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 31 L.Ed. 2d 551 (1972). Reasonable rules of administration such as those which limit the number of counsel allowed to argue or the length of time provided for argument are acceptable functional attempts to speed the judicial process while preserving the right to the effective representation of counsel, but a rule which entirely eliminates oral argument destroys

counsel's opportunity to clarify the issues and, therefore, violates the Sixth Amendment.

Whether or not the right to effective counsel at the appellate stage includes the right to oral argument is an important question of Federal procedure which affects large numbers of appellants and should be settled by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the fifth Circuit.

Respectfully submitted,

Joe B. Goodwin
455 Milam Street
Beaumont, Texas 77701
ATTORNEY
FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of April, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

Joe B. Goodwin
455 Milam Street
Beaumont, Texas 77701

COUNSEL FOR
PETITIONER

APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

March 28, 1974

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL COUNSEL OF RECORD
Re: No. 73-2729 - U.S.A. v. Niezek

Gentlemen:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

/s/ Susan LeBrun
Deputy Clerk

cc: Mr. Everett Lord
Mr. Tanner T. Hunt, Jr.
Mr. Joe B. Goodwin
Mr. Roby Hadden
Mr. Charles E. Myers

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
March 28, 1974

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

Mr. Joe B. Goodwin
Attorney at Law
455 Milam
Beaumont, Texas

No. 73-2729 - U.S.A. vs. Jerry S. Niezek
MANDATE STAYED TO: APRIL 26, 1974
(See Order Enclosed)

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during

the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and our letter advising that rehearing was denied, which are still required by the Supreme Court to be incorporated as an appendix to your opinion.

Very truly yours,

EDWARD W. WADSWORTH,
/s/ CLARA F. SACHS
Deputy Clerk

enc.
cc Mr. Charles E. Myers

APPENDIX C

UNITED STATES of America,
Plaintiff-Appelle,

versus

Jerry S. NIEZEK,
Defendant-Appellant.

No. 73-2729

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.
Feb. 14, 1974.

Appeal from the United States District Court for the Eastern District of Texas.

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM:

Appellant Niezek appeals from his conviction on a two-count indictment for violations of Title 18, U.S.C., Sections 1955 and 2, and Title 18, U.S.C., Section 371.

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*Rule 18, 5 Cir.; Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

The evidence was submitted on a written stipulation before the District Court, the appellant having waived his trial by jury. After a careful review of the record, we find no merit in Niezek's contentions that the evidence was insufficient to sustain his conviction on either count, and we affirm as to both counts.

Affirmed.

APPENDIX D

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-2729
Summary Calendar

D. C. Docket No. CR B 73-CR-14

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JERRY S. NIEZEK,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is nowhere ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate: February 14, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1604

JERRY S. NIEZEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his conviction and that he was denied effective assistance of counsel because the court of appeals affirmed his conviction without oral argument.

Following a jury-waived trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of conducting an illegal gambling business involving five or more persons and of conspiring to do so, in violation of 18 U.S.C. 1955 and 371. He was sentenced to concurrent terms of three years' imprisonment, with all but six months suspended, placed on probation for three

years, and fined $5,000. The court of appeals affirmed (Pet. Apps. C and D).[1]

The evidence presented at trial consisted of a stipulation (Gov. Exh. 1). The stipulated facts show that in 1972 petitioner was part of a large pyramidally structured illegal gambling operation centered in Beaumont, Texas, involving betting on college and professional football games. At the top of the operation was James Tuppen, who determined the betting line and took lay-off bets; at the bottom were petitioner and other bookmakers,[2] who used the betting line and placed the lay-off bets. Between the bookmakers and Tuppen were the middlemen—Marion Johnsom and Robert Carter—who disseminated the betting lines determined by Tuppen and picked up the lay-off bets from the bookmakers.

Petitioner and the other bookmakers profited by collecting a 10% surcharge on each bet and balancing their bets for each game. Thus, if an equal amount was bet on each team, money from the losers would cover the amounts won by the winners, and petitioner would retain the 10% surcharge. Often, however, the bookmakers would have uneven betting on certain games. To balance their books they would then place "lay-off" bets with other bookmakers. Petitioner and co-defendants Sekaly and Lefkowitz

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[1]This Court has granted certiorari in *United States* v. *Iannelli*, No. 73-64, to consider whether there can be separate convictions for conspiracy and for a substantive offense under 18 U..C. 1955, but that issue, which petitioner has not raised at any point in these proceedings, need not be reached here because the sentences for the separate offenses were made concurrent. *Barnes* v. *United States*, 412 U.S. 837, 848, n.16.

[2]Raymond Lefkowitz, Walter Sekaly, Vernon Roberts, Frank Ferguson and Richard Sanders. In addition, Robert Carter, Herbert Mitchell and Willie Griggie took bets directly for Tuppen.

all "layed-off" their bets with the same middleman, one Marion Johnson, or his assistant, Dr. Richard Jones. Johnson in turn would lay off his uneven bets with James Tuppen.

In addition to laying off bets with the middlemen, petitioner and the other bookmakers in the operation received from them information on the betting line for specific football games. The middlemen got this information from Tuppen, who got if from various sources around the country. The betting line consisted of a point spread or odds between the two teams involved in a specific game.[3]

1. Petitioner contends that his conduct was not prohibited by 18 U.S.C. 1955 because there was not one operation, but only a number of small, separate gambling operations, each involving fewer than the five persons required for violation of Section 1955. To support this position, petitioner points to the fact that the bookmakers not only did not work together, but were in competition with each other.

In *Blumenthal* v. *United States*, 332 U.S. 539, 558, this Court, faced with the same argument in a situation where a number of salesmen were separately selling whiskey furnished by one source in violation of the Emergency Price Control Act, stated: "By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

Here the facts show that petitioner and the other bookmakers were parties to the same large common plan based

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[3]The giving of a point spread or odds was very important. Since teams were rarely exactly evenly matched in any given football game, it was necessary to give points or odds on the game in order to get balanced betting.

on the same single goal. They were all participants in one large pyramidally structured gambling operation, the essence of which was the dissemination of a betting line and the placing of lay-off bets between the parties. Moreover, by laying off their bets to the same person, they were in effect indirectly balancing their books with each other, thus combining their profits and losses among themselves.

2. Petitioner's contention that the determination of his appeal without oral arguments deprived him of his Sixth Amendment right to effective assistance of counsel is without merit. This Court has held that the Constitution does not require oral arguments in all cases. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 276. At least two circuits now decide some cases without oral argument. See *Huth* v. *Southern Pacific Company*, 417 F. 2d 526 (C.A. 5); *National Labor Relations Board* v. *Local 42, International Ass'n of Heat & F.I. & A. Workers*, 476 F. 2d 275, 276 (C.A. 3); *United States* v. *Revel*, 455 F. 2d 608 (C.A. 5), certiorari denied, 407 U.S. 922.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.